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84-956

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS,
CLERK

PAUL SHAW,

PETITIONER

-versus-

STATE OF GEORGIA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the plain view exception to the warrant requirement under the Fourth Amendment to the Constitution of the United States allows law enforcement officers executing a search warrant for Petitioner's business premises, which particularly describes specific items searched for, to conduct a general exploratory search of Petitioner's premises and to record all of the motor vehicle identification numbers on all vehicles at the searched premises without prior approval of the issuing magistrate when the officers intended to search for and seize the evidence at the time the search warrant was obtained.

II.

Whether a time lapse of five (5) months and one (1) week between the alleged criminal activity and the application for

the issuance of a warrant was too long to furnish sufficient probable cause for the issuance of a search warrant for the premises of Petitioner's place of business under the Fourth Amendment to the Constitution of the United States.

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IN THE

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PAUL SHAW,
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-versus- :
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OPINIONS DELIVERED BELOW

Published Decisions:

THE STATE V. SHAW, 170 Ga. App. 404 (Case No. 67082, decided March 12, 1984)

SHAW V. THE STATE, 253 Ga. 382 (Case No. 41047, decided September 26, 1984)

JURISDICTION

Petitioner seeks a review of a judgment of the Supreme Court of Georgia dated September 26, 1984, Justice Smith dissenting.

Rehearing was denied by Order dated October 16, 1984, Chief Justice Hill dissenting.

Since substantial Federal questions arising under the Constitution of the United States are involved in this case, the jurisdiction of this Court is invoked under the provisions of Article III, Section 2, of the Constitution of the United States, 28 United States Code Section 1257(3), and Rule 19(1) of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Federal questions arising under the Fourth Amendment to the United States Constitution which provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized. (Emphasis Supplied)

STATEMENT OF THE CASE

A. STATEMENT OF PLEADINGS IN THE CASE.

Petitioner was indicted by the Grand Jury of Walker County, Georgia, and charged in Indictment Nos. 12,418 and 12,419 with Theft by Receiving a Stolen Motor Vehicle. (R.3-4, 7-8) He was charged in Indictment No. 12,420 with Possession of a Motor Vehicle Transmission with an Altered Identification Number. (R.11-12)[1]

On May 13, 1983, Petitioner filed his Motion to Suppress Evidence Illegally Obtained which alleged that on February 24, 1983, GBI Agent Scott Roberts and other law enforcement officers illegally searched his business premises on Highway 27 North in

[1]Citations to the record are cited "R", followed by the page to which reference is made. Citations to the transcript of the hearing are cited "T" followed by the page to which reference is made.

LaFayette, Georgia. (R.17-19) At the conclusion of an evidentiary hearing, the Trial Court entered an order granting the Petitioner's Motion to Suppress. (R.31)

The State of Georgia filed a Notice of Appeal on June 3, 1983. (R.1) On March 12, 1984, the Court of Appeals of Georgia reversed the Trial Court's order granting the Motion to Suppress. THE STATE V. SHAW, (See Appendix "A") 170 Ga. App. 404 (1984) The Supreme Court of Georgia granted certiorari to review the judgment of the Court of Appeals of Georgia and on September 26, 1984, affirmed the Court of Appeals, Justice Smith dissenting. SHAW V. THE STATE, 253 Ga. 382 (1984) (See Appendix "B") Within the time provided by law the Petitioner filed a Motion for Rehearing which was denied on October 16, 1984, Chief Justice Hill dissenting. (See Appendix

"C"), Notice of intention to apply for writ of certiorari was filed on October 25, 1984.

B. STATEMENT OF FACTS.

GBI Agent Scott Roberts, a member of the State Auto Theft Squad, on February 23, 1983, received information from FBI Agent Wayne Sturdivant and Agent Harold Compton of the National Automobile Theft Bureau upon which he made application for the issuance of a search warrant for the Petitioner's business premises. (T.2,13) The affidavit for the search warrant specified that Roberts had probable cause to believe that on the premises known as Paul Shaw Body Shop in LaFayette, Georgia, was located certain property, namely a "1981 Monte Carlo, VIN, 1G1AZ37J1BK469818, engine, transmission, and

front clip [2] which was stolen property." (T.24) The facts stated in the affidavit as constituting probable cause were as follows:

> "On Tuesday, February 22, 1983, Affiant was contacted by FBI Agent Wayne Sturdivant. Agent Sturdivant advised Affiant that Paul Shaw, on September 15, 1982, sold the rear clip of the above-described vehicle to Bobby Hill of Cookeville, Tennessee. On February 1, 1983, FBI Agent James L. Harcum, Jr., identified the rear clip of the above-described vehicle as stolen. The vehicle was found to have been stolen from Kenneth D. Brite of Ringgold, Georgia, on August 21, 1982. Through independent investigation, Affiant has established that Agent Harold Compton of the National Automobile Theft Bureau has a current investigation of Paul

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[2]Roberts testified that the "rear clip. . . would be the rear portion of the car. . . the trunk area with the rear fenders, deck lid, and back seat area would be the rear clip." (T.3) "He testified that among people who build cars and rebuild wrecked cars it is a common practice to cut them in half and use the parts that are not damaged. If the rear clip is damaged bad, they can buy-- they will clip the car, and the front clip will still be good and they can rebuild it with another rear clip." (T.4)

> Shaw Body Shop concerning the above-named theft. Affiant has also established through Agent Harold Compton and Agent Wayne Sturdivant that Paul Shaw has been the subject of past auto theft investigations conducted by their respective agencies." (T.24)

Based upon this information and the affidavit to search for a 1981 Monte Carlo engine, transmission and front clip, a search warrant was issued specifically authorizing the search of the Petitioner's premises for "a 1981 Chevrolet Monte Carlo, VIN 1G1AZ37J1BK469818 engine and transmission and front clip." (T.26)

Two days after the issuance of the warrant, Roberts and eight other law enforcement officers, including an Investigator from the District Attorney's Office went to Petitioner's place of business to execute the search warrant. (T.24,26,15) He testified that everyone broke up into teams which were instructed prior to going to

Petitioner's place of business to obtain the VIN numbers on all vehicles there. (T.15) He further testified that this was done "because we wanted to make a check of all vehicles that were there, yes sir." (T.16) He admitted that although the law enforcement officers wanted to check all of the vehicles at Petitioner's business premises he did not ask for judicial authority or permission to canvass the entire premises and to check all of the VIN numbers. (T.16) He testified that the business premises of Petitioner consisted of an area "over half an acre or an acre" and that approximately sixty-five (65) vehicles were checked by the law enforcement officers, who were ostensibly there to search for a specific 1981 Monte Carlo engine, transmission and front clip which was reported stolen and for which judicial

authority had been granted to search and seize.

REASONS FOR ALLOWING THE WRIT

I. THE SUPREME COURT OF GEORGIA IN APPLYING THE PLAIN VIEW DOCTRINE TO THIS SEARCH AND SEIZURE UNDER A WARRANT, HAS OVERLOOKED THE CONTROLLING AUTHORITY OF COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443 (91 S. CT. 2022, 29 L.ED. 2D 264) (1971) AND HAS MISCONSTRUED, MISAPPLIED AND MISINTERPRETED TEXAS V. BROWN, _____, U.S. _____ (103 S.CT. 1535; 75 L.ED. 2D 502) (1983) SO AS TO ALLOW A GENERAL EXPLORATORY SEARCH OF PETITIONER'S BUSINESS PREMISES IN VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHTS.

The Supreme Court of the United States in the early case of BOYD V. UNITED STATES, 116 U.S. 616 (6 S.Ct. 524, 29 L.Ed. 746) (1886), traced the historical requirement for warrants particularly describing things to be seized. The Court cited Lord Camden's

discussion of the subject in ENTICK V. CARRINGTON AND THREE OTHER KING'S MESSENGERS, 19 How. St. Tr. 1029 and quoted extensively from Lord Camden's judgment which traced the issuance of general warrants to search and seize evidence to the time before the Star Chamber and condemned general warrants. Justice Butler, writing the majority opinion in BOYD V. UNITED STATES, went on to state:

> "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures', it is only necessary to recall the contemporary and then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental

> principles of law, that ever was found in English law books;' since they placed 'the liberty of every man in the hands of every petty officer'." BOYD V. UNITED STATES, supra, 116 U.S. 616 at page 625, (6 S.Ct. 524, at page 529)

In WEEKS V. UNITED STATES, 232 U.S. 383, at page 391 (34 S.Ct. 341, at page 344; 58 L.Ed. 2d 652) (1914), Mr. Justice Day writing for the Court, said:

> "The effect of the Fourth Amendment is to put the Courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain convic-

> tion by means of unlawful seizures and enforced confessions. . . should find no sanction in the judgments of the Courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

The Supreme Court of the United States once again in MARRON V. UNITED STATES, 275 U.S. 192 (48 S.Ct. 74, 72 L.Ed. 231) (1927) expressly held that general searches are prohibited and that in order to avoid such general exploratory searches, the Fourth Amendment to the Constitution of the United States requires that a search warrant must particularly describe the things to be seized, and this "prevents the seizure of one thing under a warrant describing another".

Notwithstanding the authority to search for a particular 1981 Chevrolet Monte Carlo and parts thereof, GBI Agent Roberts and the

other law enforcement officers executing the search warrant in the case sub judice converted their authority into a general exploratory search in violation of the Fourth Amendment to the Constitution of the United States. The critical point here is that they did not obtain prior approval by the issuing magistrate for such a blanket sweep and inventory of the Petitioner's business premises. (T.15,16)

Agent Roberts testified at the hearing on the motion that notwithstanding the fact that they did not find the 1981 Chevrolet Monte Carlo the officers wanted to check all of the vehicles at the Petitioner's business premises and that they conducted a blanket sweep, inventory and search "over a half acre or an acre" and obtained VIN numbers from approximately sixty-five vehicles. Subsequently, two stolen vehicle reports were obtained.

(T.17) The search and seizure was neither inadvertent nor was it immediately apparent that any of the vehicles from which the numbers were seized were stolen property.

In COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443 (91 S.Ct. 2022, 29 L.Ed. 2d 264) (1971) the plurality opinion of the Supreme Court of the United States set forth the requirements of the "plain view" doctrine as an exception to the warrant requirements of the Fourth Amendment to the Constitution of the United States. In that case, it was stated as follows:

> "The limits on the 'plain view' doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless seizure of evidence. . . The second limitation is that the discovery of evidence in plain view must be inadvertent. The rationale of the exception to the warrant requirement, as just stated, is that a plain view seizure will not turn an initially

valid (and therefore limited) search into a 'general one', while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatsoever, or at least none which is constitutionally cognizable in a legal system that regards warrantless seizures as 'per se unreasonable' in the absence of 'exigent circumstances'.

If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express Constitutional requirement of 'warrants . . . particularly describing. . . (the) things to be seized' . . . . But to extend the scope of such an intrusion to the seizure of objects- not contraband nor stolen nor dangerous in themselves- which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable

> cause can justify a warrantless seizure." COOLIDGE V. NEW HAMPSHIRE, supra, 91 S.Ct. 2022, 2039-2041.

Under the facts of the case sub judice, the search and seizure by the recordation of the VIN numbers of sixty-five motor vehicles, all of which were located within a fenced area of the Petitioner's business premises, clearly was not inadvertent and violated the warrant requirement of the Fourth Amendment. Such a warrantless seizure was per se unreasonable! The officers executing the warrant knew in advance that they were going to record the numbers and clearly under the search warrant issued did not have authority to do so. The general exploratory nature of the search conducted exceeded the permissible bounds of the warrant and the Fourth Amendment to the Constitution of the United States and the majority of the Supreme Court of Georgia clearly overlooked

the controlling authority of COOLIDGE V. NEW HAMPSHIRE, supra.

The Supreme Court of Georgia, further, misconstrued and misapplied this Court's majority opinion in TEXAS V. BROWN, _____ U.S. _____, 103 S. Ct.; (75 L.Ed. 2d 502) (1983), itself a plurality decision. TEXAS V. BROWN, supra, is distinguishable on its facts from the case sub judice and secondly, this Court did not in that decision eliminate and do away with the "immediately apparent" and "inadvertence" requirements of the plain view doctrine as enunciated in COOLIDGE V. NEW HAMPSHIRE, supra.

TEXAS V. BROWN, _____ U.S. _____, 103 S.Ct. 1535; (75 L.Ed. 2d 502) (1983) is clearly not applicable to the facts of this case and was cited by the Supreme Court of Georgia for the proposition that there was no legitimate expectation of privacy shielding the interior of the sixty-five automo-

biles located at the Petitioner's business premises which were viewed from the outside by the officers conducting the search and that there was no search within the meaning of the Fourth Amendment. The majority of the Supreme Court of Georgia clearly overlooked the fact that there is a very real and fundamental distinction between a motor vehicle stopped on a public highway in a routine driver's license check point as in TEXAS V. BROWN, supra, and sixty-five wrecked motor vehicles at the Petitioner's place of business located over an acre on a fenced business premises.

The majority opinion of the Supreme Court of Georgia further misconstrued the opinion and overlooked the fact that the Supreme Court of the United States impliedly reconfirmed the requirement in "plain view cases" that it must be immediately apparent that the evidence to be seized is associated

with criminal activity. It is abundently clear that the seizure of the VIN numbers from the wrecked automobiles was done without any hint or suggestion that any of those vehicles were contraband or stolen property and it was not "immediately apparent" to the seizing officer that they constituted evidence of any crime.

While the initial intrusion of the officers onto Petitioner's business premises was lawful, it is also clear that the police did not discover the incriminating evidence "inadvertently". Indeed, Agent Roberts testified that all of the officers intended to seizure the numbers while there on the premises even before going there to execute the warrant notwithstanding the fact that Agent Roberts did not ask for authority to conduct such a blanket sweep and inventory of the Petitioner's business premises. This was clearly not the case in TEXAS V. BROWN,

supra, wherein this Court found that the meeting between Officer Maples and Brown gave no suggestion that the roadblock was a "pretext" whereby evidence of a narcotics violation might be uncovered in plain view in the course of a check of drivers licenses. In the case sub judice, the officers executing the warrant used it as a pretext for launching a general exploratory search condemned by the Constitution until at last something incriminatory emerged.

II. A TIME LAPSE OF FIVE (5) MONTHS AND ONE (1) WEEK BETWEEN ALLEGED CRIMINAL ACTIVITY AND THE APPLICATION FOR ISSUANCE OF A SEARCH WARRANT IS TOO LONG TO FURNISH PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT FOR THE PREMISES OF PETITIONER'S PLACE OF BUSINESS.

In the case sub judice, the reported criminal activity, i.e., selling a rear clip of the 1981 Monte Carlo, occurred five (5)

months and one (1) week prior to the date of the application for the search warrant. Petitioner contended that such a time lapse and interval between the date of the alleged criminal activity and the date of the application and issuance of the search warrant was too long and that the information submitted to the issuing magistrate for the issuance of the warrant was stale.

In SGRO V. UNITED STATES, 287 U.S. 206 (53 S.Ct. 138, 73 L.Ed. 260, 85 ALR 108) (1932) the Supreme Court of the United States recognized a legislative intent, as well as a Constitutional demand, that probable cause relate to current and not stale information. The Supreme Court pointed out that, "While the statute does not fix the time within which proof of probable cause must be taken by the Judge or Commissioner, it is manifest that the proof must be of facts so closely related to the

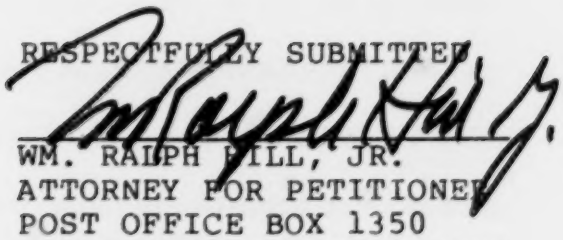
time of the issuance of the warrant as to justify a finding of probable cause at that time." SGRO V. UNITED STATES, supra, at page 210, 53 S.Ct. 138 at page 140. See SEARCH WARRANT- AFFIDAVIT SUFFICIENCY, 100 ALR 2d 525 at page 541 which states that the cases are unanimous in holding intervals of two (2) months or more between the act and the affidavit to be impermissible.

CONCLUSION

This Court should grant the writ of certiorari to the Supreme Court of Georgia to review the majority decision rendered by that Court on September 26, 1984, and should reverse that decision, which is erroneous as a matter of law and violates the Petitioner's rights under the Fourth Amend-

ment to the Constitution of the United States.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

This is to certify that I am a member of the Bar of the Supreme Court of the United States of America and that I have this date served a copy of the above and foregoing Petition for Writ of Certiorari upon the following persons by placing a copy thereof in an envelope properly addressed to them with sufficient postage thereon for the same to arrive at their destinations and by placing same in the United States Mails addressed to them at the following addresses:

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This 14th day of December, 1984.

WM. RALPH HILL, JR.
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THE STATE OF GEORGIA,

Appellant

-versus-

PAUL SHAW,

Appellee

No. 67082

COURT OF APPEALS

OF GEORGIA

MARCH 12, 1984

SOGNIER, Judge.

The state appeals the granting of a motion to suppress evidence found on the business premises of Shaw in a search made pursuant to a warrant. The state contends it was error to grant the motion (1) because the information forming the basis of the warrant was not stale; (2) even if the

search warrant was invalid the property seized was in plain view; and (3) inspection of VIN's (vehicle identification numbers) is not a search prohibited by the Fourth Amendment to the Constitution of the United States.

The evidence at the suppression hearing disclosed that on February 22, 1983 Scott Roberts, a GBI agent with the Auto Theft Squad, received information from an FBI agent that on September 15, 1982 Paul Shaw had sold a rear clip (the rear half of an automobile) of a stolen 1981 Chevrolet Monte Carlo in Cooksville, Tennessee. The car had been stolen on August 21, 1982. Based on this information, together with information that the National Auto Theft Bureau had a current investigation of the Paul Shaw Body Shop and the FBI had investigated him in the past, Roberts obtained a search warrant. In his affidavit Roberts stated that this information gave him probable cause to believe the front clip, engine and transmission of

the stolen Monte Carlo was concealed at Shaw's Body Shop.

The warrant was issued on February 22, 1983 authorizing Roberts to search for and seize the front clip, engine and transmission of the stolen Monte Carlo. The warrant was executed by seven law enforcement officers and an investigator from the district attorney's office, with instructions to record the VIN of every motor vehicle at Shaw's. The VIN's of 65 vehicles were recorded, taken to the State Patrol Post in LaFayette, Georgia and run through a computer. It was discovered that a 1975 Ford pickup truck and a 1977 Volkswagen Sirocco on Shaw's property were stolen vehicles; he was charged with theft by receiving stolen property, namely, the 1975 Ford pickup. Based on this evidence the trial court granted Shaw's motion to suppress, and the state appeals. The state argues that due to the bulk and size of the front clip, engine and transmission from the stolen Monte Carlo

the information that Shaw had sold the rear clip over five months earlier was not stale. We agree.

When Roberts obtained the warrant in this case he knew that Shaw was under investigation for suspected auto theft and had been investigated in the past by the FBI for suspected auto theft. Since Shaw had sold the rear half of the 1981 Monte Carlo, Roberts had probable cause to believe that the front half of the Monte Carlo, together with its engine and transmission, was still concealed at Shaw's Body Shop. The determination of what time lapse is permissible depends upon several factors, including size, quantity, bulkiness, transportability and the nature of the product. State v. Boswell, 131 Ga. App. 657, 660-661 (1) (206 S E 2d 682)(1974). Considering the fact that the front clip could not be driven, and there was no indication that it had been sold, it was reasonable to assume that the front clip was at Shaw's Body Shop, since

Shaw was the individual who had sold the rear clip. Thus, we find that the information Baker received was not stale under the circumstances of this case, and he had probable cause to believe the Monte Carlo was at Shaw's Body Shop.

Since the officers conducting the search were on Shaw's property pursuant to a valid search warrant, they were entitled to seize any contraband in plain view. Harris v. United State, 390 U.S. 234, 236 (88 S C 992, 19 LE 2d 1067). The VINs of the vehicles at Shaws were on the dashboards, readily visible through the windshield. What a person knowingly exposes to the public, even in his own home or office, is not a subject of the Fourth Amendment protection. Katz v. United States, 389 U.S. 347, 351 (88 SC 507, 19 LE 2d 576). Thus, it was error for the trial court to grant Shaw's motion to suppress evidence.

Judgment reversed. Quillian, P.J., and Pope, J., concur.

APPENDIX "A"

PAUL SHAW,

Appellant

-versus-

THE STATE OF GEORGIA,

Appellee

No. 41047

IN THE SUPREME COURT OF GEORGIA

Decided: 9/26/84

WELTNER, Justice.

Police officers entered the open business premises of Shaw's automobile repair shop during business hours, for the purpose of executing a search warrant relating to the front-half of a specified motor vehicle which was thought to be stolen. Under instructions of their superiors, they looked through the windshields of vehicles parked

on Shaw's outdoor lot, and wrote down vehicle identification numbers, which were visible on the dashboard of each vehicle. No vehicle was entered; no door of any vehicle was opened; no physical object was seized from the vehicles. Two vehicles subsequently identified by computer check as stolen later were impounded.

Shaw's motion to suppress evidence relating to one of the vehicles later determined to be stolen was sustained by the trial court. The Court orf Appeals reversed. We granted certiorari to determine whether, under these circumstances, recordation of vehicle identification numbers was authorized by the "plain view doctrine." Shaw v. State, 170 Ga. App. 404 (Case No. 67082, decided March 12, 1984).

In Sewell v. State, 238 Ga. 495 (2) (233 SE2d 187)(1977), this Court approved the seizure, without a warrant, of pornographic material which "was displayed in a

glass case in plain view for everyone who walked in to see." See also Robinson v. State, 143 Ga. App. 37, 40 (5) (237) SE2d 436)(1977). We are unable to perceive any rational distinction between observation through the glass of a display case, as in Sewell, supra, and observation through the glass of a windshield, as in this cases. "There is no legitimate expectation of privacy [cases omitted] shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled...[the officers] to observe the interior of...[the vehicles] was not a search within the meaning of the Fourth Amendment." Texas v. Brown, ____U.S.___ (103 SC 1535, 1542; 75 LE2d 502)(1983). Accordingly, the judgment of the Court of Appeals must be affirmed.

Judgment affirmed. All the Justices concur, except Smith, J., who dissents.

41047. Shaw v. The State

SMITH, JUSTICE, dissenting.

This is a warrant case involving a fenced area behind the garage and office of a body shop. The warrant in this case authorized the officers involved to search the enclosed area for the front end, or clip, of a 1981 Monte Carlo with vehicle identification number 1G1AZ37J1BK469818. This was the sole "instrument, article, or [thing]" described in the warrant.

The special agent for the Georgia Bureau of Investigation who led the search testified that he was instructed prior to the search to inspect every vehicle on the lot. He stated that he and the other agents did "make a check of all of the vehicles that were there." They inspected sixty-five vehicles and did not see a 1981 Monte Carlo.

"The officer [can] not use [a] warrant as a pretext for launching a full scale investigation as to the origins of an item

which [is] not incriminating on its face." Hogan v. State, 140 Ga. App. 716, 718 (231 SE2d 802)(1976). The agent in this case has testified that he did use the warrant in exactly this manner. He was quite aware that the sixty-five cars he had searched were not Monte Carlos. A warrant to search for one particular car was used to effect a blanket sweep of the entire enclosed area adjacent to the body shop. This search was actually a general search, prohibited by the Fourth Amendment to the U.S. Constitution and Article 1, Section 1, Para. 13 of the Georgia Constitution. Hogan, supra; Marron v. United States, 275 U.S. 192 (48 SC 74, 72 LE 231)(1927).

The majority reaches the conclusion that the "recordation of the vehicle identification numbers was authorized by the 'plain view doctrine.'" Under the plain view doctrine, the investigating officer must be lawfully in a position to observe

the evidence in question, his discovery of the evidence must be inadvertent, and there musat be probable cause to associate the evidence with criminal activity. Texas v. Brown, ____U.S._ __ (103 SC 1535, ____LE2d___)(1983); Coolidge v. New Hampshire, 403 U.S. 443 (91 SC 2022, 29 LE2d 264)(1971).

Here, the agents entered appellant's lot with a valid search warrant. The recordation of the numbers, however, could hardly be said to be inadvertent. The agent in charge, possessing a warrant naming one specific automobile, testified that he was instructed to "check" all of the vehicles, intended to "check" all of the vehicles and did "check" all of the vehicles. When a man says that he is going to do something and then does it, his actions can hardly be said to be inadvertent. The agent clearly used his warrant as a pretense to acquire certain evidence. See Coolidge, supra at 470, 91 SC at 2040.

Even if the discovery of the evidence here could be described as inadvertent, the court must still determine that the evidence would give the investigating officer probable cause to believe that the evidence is connected with a crime. Here, the agents could have discovered two things in their search. The vehicles could have had vehicle identification numbers, or the vehicles could have lacked vehicle identification numbers.[1]

If the vehicles did not have identification numbers, the agents would have had evidence that a crime had taken place. See OCGA § 40-4-6, OCGA §40-4-21. If the court determines that the presence of an identification number establishes probable cause, as it must in order to apply the plain view exception here, then all that an officer has

---

[1]Actually, the agents' search should not have even reached the identification number once it was established that the vehicle under observation was not a 1981 Monte Carlo.

to do to establish probable cause in this state is to look where the identification number should be. The presence of the identification numbers established lawful behavior. Only the illegal acts of the agents involved turned up evidence of criminal behavior.

The marjority cites Sewell v. State, 238 Ga. 495 (233 SE2d 187)(1977), in support of its holding. The court states that it sees no difference between the observation through glass in a windshield here. The medium through which an officer observes evidence will generally prove to be irrelevant to the plain view issue. Many officers themselves wear glasses constantly.

The plain view issue hinges most often on the context and the object of the observation. The observation of a bloody knife or a bazooka through a windshield will probably establish probable cause, where the sight of an inspection number on an object in a dis-

play case often would not. The object of the observation in Sewell, supra, was clearly contraband according to the court. Here, the object of the observation is just as clearly not indicative of criminal activity.

In addition, Sewell, supra, clearly involved a retail area and did not involve a warrant. This case revolves around the search of an area that was not clearly open to the public. The search was limited by the warrant. Sewell is irrelevant to the majority's holding.[2]

The passage of Brown, supra, cited in the majority opinion is inapposite to this case for a least three reasons. First, the passage dealt with the first issue in the case: whether the officer was legitimately present at the scene when he observed the evidence in question. Here, the agent poss-

[2]Robinson v. State, 143 Ga. App. 37 (237 SE2d 436)(1977), cited with Sewell, is almost identical in its facts and its holding. For this reason, it is equally out of place in the opinion.

essed a warrant to search appellant's property. The quoted passage does not relate to any contested facet of the plain view issue in this case. It is purely superfluous.

In addition, the quoted passage held that there was not search involved in Brown. Here, we have a search warrant and an entry onto private property. I should hope that the agents' actions constituted a search.

Finally, Brown does not support a hold that the sight of the vehicle identification numbers establishes probable cause, a necessary requirement for a finding of the plain view exception. The officer in Brown testified that he recognized the balloon that fell from the defendant's pocket and the vials in the glove compartment as drug paraphernalia. "A 'practical, nontechnical' probability that incriminating evidence is involved" could hardly have developed in Brown had the officer there looked into the

car and seen a vehicle inspection number. Brown, supra, at ____, 103 SC at 1543. Brown, if anything, supports the trial court's original decision.

As this search was actually a general search and did not fall under the plain view exception, I would reverse the Court of Appeals' opinion and reinstate the ruling of the trial court.

PAUL SHAW,

APPELLANT

-versus-

THE STATE OF GEORGIA,

APPELLEE

CASE NO. 41047

IN THE SUPREME COURT OF GEORGIA

CLERK'S OFFICE, SUPREME COURT OF GEORGIA - Atlanta October 16, 1984.

The motion for a rehearing was denied today. HILL, C.J., dissents.

s/MRS. JOLINE B. WILLIAMS, CLERK

Office-Supreme Court, U.S.
FILED
JAN 17 1985
ALEXANDER L. STEVAS,
CLERK

(2)

NO. 84-956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL SHAW,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether this Court should grant a writ of certiorari to examine the allegation that recordation of vehicle identification numbers by an officer from the exterior of the vehicle, during the conduct of a search pursuant to a valid warrant, is in itself an illegal search in violation of the Fourth Amendment to the United States Constitution?

2.

Whether this Court should grant a writ of certiorari to examine the Petitioner's allegations that information provided in support of a search warrant was "stale," where the subject of the search warrant was the front end of a vehicle which was

reasonably likely to be present at the location named in the warrant?

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NO. 84-956

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STATE OF GEORGIA,

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TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Paul Shaw, was indicted in the Superior Court of

Walker County, Georgia, for the offenses of theft by receiving stolen property and criminal use of an article with an altered identification mark. Thereafter, the Petitioner filed a motion to suppress certain information obtained by means of a search of his business premises, alleging flaws in the search warrant and that the actual search conducted exceeded the scope of the search warrant. While at the Petitioner's business premises, police officers had observed and recorded the vehicle identification numbers (VIN) of each vehicle on the Petitioner's premises, and it was later determined that two of these vehicles were stolen. The trial court granted the Petitioner's motion to suppress.

The trial court's granting of the motion to suppress was then appealed by the State to the Court of Appeals for the State of Georgia, which reversed the trial court's decision. State v. Shaw, 170 Ga. App. 404, 317 S.E.2d 298 (1984). The Court of Appeals for the State of Georgia denied rehearing of the Petitioner's case on March 21, 1984.

The Petitioner then sought a writ of certiorari to the Supreme Court of Georgia, which was granted, and the decision of the Court of Appeals for the State of Georgia was affirmed. Shaw v. State, 253 Ga. 382, ___ S.E.2d ___ (1984).

Petitioner now seeks a writ of certiorari from this Court to review the affirmance of the decision of the

Court of Appeals by the Supreme Court of Georgia.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA CORRECTLY DETERMINED THAT THE RECORDATION OF VEHICLE IDENTIFICATION NUMBERS BY A POLICE OFFICER FROM THE EXTERIOR OF THE VEHICLE, DURING THE CONDUCT OF A SEARCH PURSUANT TO A VALID WARRANT, WAS NOT A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT AND DOES NOT VIOLATE THE "PLAIN VIEW DOCTRINE."

Petitioner contends that the recordation of vehicle identification numbers from the exterior of a vehicle, without a warrant expressly authorizing such recordation, is a violation of his rights under the Fourth Amendment to the United States Constitution. Respondent submits that such an action does not amount to a search within the meaning of the Fourth Amendment, and the recordation of such vehicle identification numbers was authorized by the "Plain View" doctrine.

The Supreme Court of Georgia recounted the particular facts leading to the challenged search as follows:

> Police officers entered the open business premises of Shaw's automobile repair shop

during business hours, for the purpose of executing a search warrant relating to the front-half of a specified motor vehicle which was thought to be stolen. Under instructions of their superiors, they looked through the windshields of vehicles parked on Shaw's outdoor lot, and wrote down vehicle identification numbers, which were visible on the dashboard of each vehicle. No vehicle was entered; no door of any vehicle was opened; no physical object was seized from the vehicles. Two vehicles subsequently

identified by computer check as stolen later were impounded.

Shaw v. State, 253 Ga. 382, ___ S.E.2d ___ (1984). The Petitioner claimed this recordation was a search in violation of the Fourth Amendment. Id.

Citing this Court's decision in Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535 (1983), the Supreme Court of Georgia concluded that the Petitioner had no legitimate expectation of privacy as to the vehicle identification numbers which could be viewed from the outside of the vehicles by either an inquisitive passerby or diligent police officers, and therefore the action of the officers in the instant case was not a

search within the meaning of the Fourth Amendment. Shaw v. State, 253 Ga. 382-83, citing, Texas v. Brown, 103 S.Ct. at 1542.

The Supreme Court of Georgia correctly applied federal constitutional principles in the rejection of the Petitioner's claims. This Court has noted that the essential purpose of the Fourth Amendment is to shield citizens from unwarranted intrusions into their privacy. Jones v. United States, 357 U.S. 493, 498 (1958). A search and observation of the exterior of an automobile, even to the point of the obtaining of physical evidence, has been held by this Court not to be an invasion of such privacy and is therefore not an unreasonable search

under the Fourth and Fourteenth Amendments. Cardwell v. Lewis, 417 U.S. 583, 592 (1974). The examination of a vehicle is far less intrusive on a person's Fourth Amendment rights than a search of one's person or a building. Id. at 590, citing, Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973). "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Id. at 590.

As noted in Brown, when property is left in a public place, police may need no justification under the Fourth Amendment for their access to the item. Brown at 1540-41 n. 4. An officer's mere observation of an item

left in plain view generally involves no Fourth Amendment search, and the information obtained as a result of such an observation in plain sight may be the basis for probable cause or reasonable suspicion of illegal activity. Id.

In the instant case, investigating police officers read various vehicle identification numbers from the exterior of the vehicles. The numbers were readily apparent on the dash-boards of the vehicles, as viewed through the windshields. As with the vehicle's license plate number, the VIN was placed so that it could be readily observed from the exterior of the vehicle for the purposes of identifying the vehicle. The Petitioner in the instant case could

have no legitimate expectation of privacy regarding the VIN. Therefore, the recordation of these numbers was not a search within the meaning of the Fourth Amendment, and gives rise to no constitutional violation on behalf of the Petitioner.

Additionally, Respondent notes that the police officers involved took the actions complained of while conducting a lawful search at the Petitioner's public place of business during normal business hours. The Petitioner himself concedes that, "the initial intrusion of the officers onto Petitioner's business premises was lawful." (See Petitioner's brief, p. 19.) It has long been settled that objects falling in plain view of an officer who has a right to be in the

position to have that view are subject to seizure and may be introduced into evidence. Harris v. United States, 390 U.S. 234, 236(5) (1968); accord, Ker v. California, 374 U.S. 23, 43 (1963). Therefore, the investigating police officers had met the first prong of the "plain view exception," as first expressed in Coolidge v. New Hampshire, 403 U.S. 443 (1971).

As explained by this Court in its plurality opinion in Texas v. Brown, supra, the discovery of stolen property at the Petitioner's business was also "inadvertent." There is no indication in the record of the instant case that the police officers had anything beyond a generalized expectation that there was the possibility that some of the cars in

Petitioner's possession might be stolen. See Brown at 1543. The officers had no reason to believe that any particular object located on the business premises was actually stolen, and therefore this created no bar to the "search" conducted here. Id. at 1543-44.

Finally, the plurality of this Court held in Brown that the "immediately apparent" language of Coolidge did not establish any requirement that a police officer "know" that certain items are contraband or evidence of a crime. Brown at 1542. A "practical, non-technical" probability that incriminating evidence is involved is all that is required before any seizure of an object could be made.

Brown at 1542-43. Given the nature of the police information in the instant case, and the fact that no seizure of property was actually made at the time of the search, there was a sufficient practical, non-technical probablity that incriminating evidence might be uncovered at the Petitioner's place of business.

Accordingly, no Fourth Amendment violation is presented by the officer's observations of the VIN readily apparent through the windshields of the vehicles, and the Supreme Court of Georgia correctly determined that the Petitioner's allegation is without merit. Therefore, for all of the above and foregoing reasons, Respondent asserts that the Petitioner has failed to

present any substantive issue of federal law which would warrant review by this Court.

B. THE COURT OF APPEALS FOR THE STATE OF GEORGIA CORRECTLY DETERMINED THAT INFORMATION PROVIDED IN SUPPORT OF THE SEARCH WARRANT OF THE PETITIONER'S BUSINESS PREMISES WAS NOT "STALE," WHERE THE SUBJECT OF THE WARRANT WAS REASONABLY LIKELY TO BE PRESENT AT THE LOCATION NAMED IN THE WARRANT.

Petitioner contends that the search warrant of his business premises was supported by "stale" information. Respondent submits that the Court of Appeals for the State of

Georgia correctly determined that there was no merit to the Petitioner's contention.

The Court of Appeals for the State of Georgia summarized the facts surrounding the issuance of the challenged search warrant as follows:

> The evidence at the suppression hearing disclosed that on February 22, 1983 Scott Roberts, a (Georgia Bureau of Investigation) agent with the Auto Theft Squad, received information from an FBI agent that on September 15, 1982 Paul Shaw had sold a rear clip (the rear half of an automobile) of a stolen 1981 Chevrolet Monte Carlo in Cooksville,

Tennessee. The car had been stolen on August 21, 1982. Based on this information, together with information that the National Auto Theft Bureau had a current investigation of the Paul Shaw Body Shop and the FBI had investigated him in the past, Roberts obtained a search warrant. In his affidavit Roberts stated that this information gave him probable cause to believe the front clip, engine and transmission of the stolen Monte Carlo was concealed at Shaw's Body Shop.

The warrant was issued on February 22, 1983 authorizing

> Roberts to search for and seize the front clip, engine and transmission of the stolen Monte Carlo.

State v. Shaw, 170 Ga. App. 404, 317 S.E.2d 298 (1984).

Petitioner claimed that as the warrant was not issued until five months and one week after the alleged sale of the rear clip of the stolen car, the information was "stale" and could not support probable cause. The Court of Appeals for the State of Georgia rejected the Petitioner's claim, looking at several factors, including size, quantity, bulkiness, transportability and the nature of the product. Id., citing, State v. Boswell, 131 Ga. App. 657, 660-661(1), 206 S.E.2d 682 (1974). The court stated that:

> Considering the fact that the front clip could not be driven, and there was no indication that it had been sold, it was reasonable to assume that the front clip was at Shaw's Body Shop, since Shaw was the individual who had sold the rear clip. Thus, we find the information Roberts received was not stale under the circumstances of this case, and he had probable cause to believe the Monte Carlo was at Shaw's Body Shop.

State v. Shaw, 170 Ga. App. at 405.

The decision of the Court of Appeals for the State of Georgia was demonstrably in accord with this

Court's evaluations of probable cause for a search warrant, as expressed in Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317 (1983). In Gates, a majority of this Court held, regarding the issuance of a search warrant based upon an anonymous informant's tip, that:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will

> be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 2332.

In the instant case, the Court of Appeals for the State of Georgia in effect evaluated the totality of the circumstances presented in the instant case and determined that it was highly likely that evidence of a crime would be present at the Petitioner's business premises. Therefore, the information presented to the issuing magistrate was not "stale," but provided sufficient probable cause for the issuance of the warrant.

Additionally, Respondent notes that the staleness of the warrant was not addressed by the Supreme Court of Georgia, and it is the decision of the Supreme Court of Georgia which the Petitioner seeks to have reviewed in the instant case.

Finally, Respondent notes that the Supreme Court of Georgia has adopted this Court's analysis of Illinois v. Gates, supra, to evaluate allegations of staleness regarding information in support of search warrants. State v. Luck, 252 Ga. 347, 312 S.E.2d 791 (1984). In Luck, the Supreme Court of Georgia noted that the precise date of an occurrence is not essential, but rather the inquiry which should be made by the magistrate is as to whether the factual statements within

the affidavit are sufficient to create a reasonable belief that the conditions described in the affidavit might yet prevail at the time of the issuance of the search warrant. Id. This was the approach utilized by the Court of Appeals in the instant case.

Therefore, for all of the above and foregoing reasons, Respondent asserts that the Petitioner has failed to present any substantive issue of federal law which would warrant review by this Court.

CONCLUSION

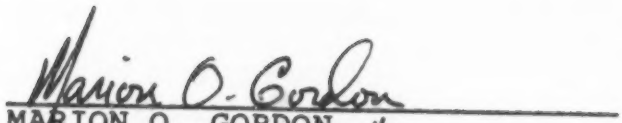
This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there is no substantial federal question not previously decided by this Court and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

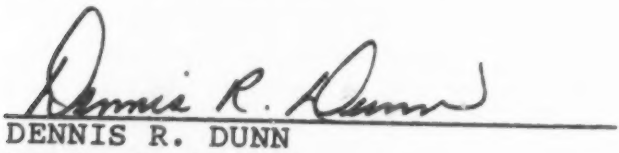
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CERTIFICATE OF SERVICE

I, WILLIAM B. HILL, JR., a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with the proper address and adequate postage to:

William Ralph Hill, Jr.
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This 16th day of January, 1985.



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